Supreme Court of the United States.

October Term, 1898.

GEORGE M. ISRAEL,
Plaintiff in Error,

vs.

No. 265.

CHARLES F. GALE, as Receiver of The Empire National Bank (Substituted for Charles Davis, as Receiver, etc.),

Brief for the Plaintiff in Error.

FRANK SULLIVAN SMITH,
Of Counsel.

Brandow Printing Co., 71 Williams St., N. Y.

United States Supreme Court.

OCTOBER TERM, 1898.

GEORGE M. ISRAEL,
Plaintiff in Error,

against

CHARLES F. GALE as Receiver of THE ELMIRA NATIONAL BANK, (substituted for Charles Davis as Receiver, etc.),
Defendant in Error.

No. 265.

Statement, Assignment of Errors and Argument on behalf of the Plaintiff in Error.

(The references are to the printed pages of the Record.)

STATEMENT.

Charles Davis, as Receiver of the Elmira National Bank, commenced an action in the United States Circuit Court for the Southern District of New York against George M. Israel, August 13, 1895 (p. 10), upon a promissory note executed by said Israel in the words and figures following:

The Amended Answer,

" $17,000.00.

" NEW YORK, May 4th, 1892.

" On demand after date I promise to pay to the " order of Elmira National Bank, seventeen thou- " sand dollars, payable at the Elmira National " Bank. No. 10,996.

" Value received,

GEO. M. ISRAEL."

The complaint is in the usual form, and contains the ordinary allegations (pp. 2–4).

The defendant's answer was filed September 24, 1895 (pp. 4, 5), and his amended answer the month following (pp. 6–8).

The Amended Answer.

1. Admits the incorporation of the Elmira National Bank, and that it carried on the business of banking at the city of Elmira, N. Y. The making of the note set forth in the complaint is admitted, but the alleged delivery thereof to the bank for value is denied.

The defendant alleges that upon making the said note he delivered the same to David C. Robinson; that said note was without consideration; that Robinson was not authorized to act as defendant's agent with regard to the note, and, if the same was delivered to said bank by Robinson, he so delivered said note to said bank for his own use, benefit and account, and not as the agent for said defendant, and in no way for the use, benefit and account of said defendant, all of which facts were well known to the bank and its officers.

2. For a second, separate and distinct defense, said defendant alleges that at the time he so made his said promissory note, Robinson, to whom

the note was so delivered, was a depositor in said bank and a director thereof and controlled and directed the affairs of said bank, and had overdrawn his account in an amount exceeding the amount of $17,000, for which said note was drawn, and that Robinson delivered said note to the bank to make good in part the amount of said overdraft; that the bank parted with no value upon the receipt of said note from said Robinson, but merely gave him credit on account for the amount thereof.

The defendant alleged further that at the time of making said note the bank had loaned to Robinson upon his paper up to the legal limit of its right to loan to any one person, and that said note was obtained from the defendant and was used by Robinson for the purpose of evading the law in procuring from the bank a greater amount of money than it was authorized to loan to one individual; that said bank and its officers well knowing that said note was without consideration and a mere subterfuge to obtain money from said bank contrary to law, and acting in collusion with Robinson, took said note from said Robinson and credited the proceeds thereof to said Robinson's account, to make good to that extent his account, which was at that time overdrawn as aforesaid; that the taking of the note by the bank under said circumstances was *ultra vires* and unlawful, and neither the bank nor the plaintiff became the lawful owner and holder thereof.

The said amended answer further alleged that at the time the defendant made said note he was not worth any substantial sum, and had no financial standing whatever, which was well known to said Robinson and said bank and its officers; that the bank and its officers well knowing defendant's inability to pay the note or any part of it, took said note from said Robinson relying solely upon said Robinson's promise to pay the same; that the

Facts.

bank and its officers placed no reliance upon defendant in the premises, and advanced money to make good Robinson's account to the amount of said note, not upon the faith of defendant's name and responsibility, but relying wholly upon and looking solely to said Robinson for the payment thereof.

Facts.

The issues thus joined came on to be tried January 14, 1896, before Hon. NATHANIEL SHIPMAN, Circuit Judge, and a jury.

The plaintiff put in evidence the said note, the defendant admitted the plaintiff's receivership, and the plaintiff rested, and gave no further evidence upon the trial.

The defendant, GEORGE M. ISRAEL, testified that in April and May, 1893, he was employed in the banking house of I. B. Newcombe & Co., as stenographer and typewriter.

The firm were interested with said Robinson in the Elmira properties (testimony of J. J. Bush, p. 23).

Said ISRAEL further testified that he was not a man of property; that he did not receive any consideration for the making of the note; that at the time of the making of the note Robinson stated to him:

"That he desired some accommodation notes, and he wanted us clerks to make them and stated the amount. He said that the reason he wanted the accommodation notes was that he had exceeded his line of discount and could not get any more accommodation; that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give these notes it would enable him to accomplish that; he also added that we would not be put in any position of paying them at any time;

that he would take care of them and gave us positive assurance on that point, and naturally, knowing the man and thinking that he was a millionaire, * * * we had no hesitation about going on the notes. He said it would simply be a temporary matter. At the time I gave the note in suit other notes were given by Mollenhauer and Roll, who were, with me, clerks in the office of I. B. Newcombe & Co. At that time neither of the members of the firm of I. B. Newcombe & Co. was at his place of business. Mr. Newcombe was in Bermuda, and Mr. Weidenfield was sick with typhoid fever at Orange, N. J. No demand has ever been made upon me for the payment of this note prior to the bringing of this suit.

I never authorized the insertion in the body of the note, after the word 'at,' of the words 'Elmira National Bank.' That space must have been left blank at the time from the fact that it was filled in afterwards; my recollection is that it was left blank" (pp. 10, 11).

JACKSON RICHARDSON, a witness for the defendant, testified that he was the president of the bank in 1892 and 1893; that said Robinson and John J. Bush, the cashier, were the active members of the directory, who had the most to say about the business of the bank (p. 12); that said Robinson controlled the policy of the bank (p. 12); that such discounts as said Robinson obtained either for himself personally or for the company of which he was president, were obtained through the cashier (p. 13); that the capital of the bank was $200,000, and the bank did not permit Robinson to have over $20,000 discount, to the knowledge of the witness (p. 14), but the witness added:

"He didn't exceed his line of discount when I was in the city; that is, of my knowledge. Probably he may have done that without my knowledge. It might have been possible for the matter to have been fixed up between him and Mr. Bush and I not know of it" (p. 14).

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The president also testified that he never had any knowledge of the note in suit or the notes of Bowers, Mollenhauer and Roll (pp. 15; 16–17); he also testified:

"Colonel Robinson usually obtained discounts through Mr. Bush and the finance committee. I don't think that all of the paper discounted by Colonel Robinson, or at his request, or for his benefit, or for the benefit of The Elmira Municipal Improvement Company, was submitted to the finance committee" (p. 16).

Several months before the bank failed the Comptroller of the Currency reported to the president an individual overdraft of Colonel Robinson (p. 13). The letter of the Comptroller was passed to Mr. Bush, the cashier (p. 16).

The president further testified to the effect that subsequent developments had satisfied him that the usual course of business in the bank was not followed in all cases, and that paper was discounted at the bank without being submitted by the cashier to the finance committee.

JOHN J. BUSH, called as a witness for the defendant, testified that he was the cashier of said bank for over three years prior to its suspension; that the by-laws provided for an exchange committee of the directors to "discount, purchase bills * * * and to buy and sell bills of exchange," but that he did not know of the bank ever having such a committee (p. 19); that he first heard of the defendant May 4th, 1893, when said Robinson presented the note in suit to witness at said bank (with the notes of Mollenhauer and Roll); and said the makers of the notes were able to pay them; that they never had paper in the bank prior to that time; and that witness never made any inquiry as to the responsibility of the makers of the notes from any other person than said Robinson (pp. 19–

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20). But the cashier admitted a moment later that the next day after said Robinson's overdraft amounted to $35,400.60, he permitted him to discount paper amounting to $54,000, about which the cashier knew nothing, and of whose makers he had never even heard (p. 20).

He subsequently testified, "I have no recollection of asking Mr. Robinson as to the responsibility of that paper" (p. 25). The cashier further testified that said Robinson's account at said bank was overdrawn at the close of business May 3d, 1893, the day before the defendant's, and said Mollenhauer's and Roll's notes were credited to said Robinson's account, $35,400.60, and it further appears from his testimony that there had been overdrafts in said account since the 12th day of March preceding, except two days, and that April 25th, *the overdraft amounted to $137,314.00* (p. 21). After trying to put in a special plea for such banking and asserting Robinson's claim that "his account was not overdrawn according to his books," he concluded: "There certainly was an overdraft that showed there weeks and weeks" (p. 21).

The Cashier testified: "It had been the custom of our bank to take such paper as its customers offered" (p. 23). And again: "My instructions from my superiors were to take care of Colonel Robinson's account.

Q. What do yon mean by that?

A. That he was entitled to such lines of discount as would be necessary to conduct his business here connected with these properties" (p. 24).

And further: "My instructions were such that I would not have a right to refuse to take the paper of our directors to that amount" (viz: $54,000) (p. 25).

The capital of the bank was but $200,000 (p.14).

When asked in the course of his examination whether he was not influenced in discounting the three notes which included the defendant's, by the

fact that there was an overdraft of over $35,000 staring him in the face, the cashier answered "No, sir; I don't know as I knew there was an overdraft" (p. 24). But the next question was:

"Q. You had no suspicion it was any such amount as that?" to which the cashier answered:
"A. I wouldn't say I hadn't any suspicion, because *I knew it was a large amount*" (p. 24).
The cashier also testified: "If the makers hadn't paid them (the Israel, Mollenhauer and Roll notes) I should look to Colonel Robinson" (p. 25).

DAVID C. ROBINSON was called as a witness on behalf of the defendant. He testified that he had been notified by the cashier of the overdraft (p. 26), and that some little time prior to or about May 4, 1893, the date of the note in suit, the cashier had called on him to make his account good (p. 26). He further testified:

"These notes (the notes of Israel, Mollenhauer and Roll) were used at the Elmira National Bank, and the proceeds, I understood, were credited to my account, at the time it was claimed by the bank there was an overdraft. I don't know whether the defendant or any of the others received any consideration at the time I obtained their paper; they didn't receive anything directly from me" (p. 26).

The said Robinson executed to the bank a guaranty in writing of the note in suit and said notes of Mollenhauer and Roll, about May 20, 1893 (p. 27).

When the bank passed into the hands of a Receiver, May 26, 1893, the aggregate amount of so-called Robinson paper in the bank was about $300,000 and of so-called Bush (the cashier) paper was about $107,000. The Israel, Mollenhauer and Roll notes were included within "the so-called Robinson paper" and the "so-called Bush paper" consisted of "the notes made by members of his family which had come to the bank through him" (p. 27).

Summary of Facts.

WM. B. EDSON, who was bookkeeper in said bank, was called as a witness on behalf of the defendant. From his testimony it appears that the place of payment of each of said notes made by Israel, Mollenhauer and Roll was written in by the assistant cashier of the bank (p. 28); that witness saw the said notes at the bank May 4, 1893, that being the day of their date, although they had been theretofore executed in the city of New York, and that the cashier directed that said notes be discounted and placed to said Robinson's account on that day; that such credit was not given until the next day, May 5th, but that by the direction of the cashier the entry of May 5th was erased, and the said notes were credited as of May 4th, the cashier having given such direction by telephone from New York, whither he had gone the night of May 4th; that said Robinson was also in New York when said cashier telephoned from New York; that said Robinson's "account "*would have been overdrawn that night about* "*$50,000 if it had not been for the entry on the* "*books of the proceeds of these notes*," and that said Robinson's personal notes in the bank then amounted to $19,000, and the notes upon which he was endorser to $34,000 (p. 28).

The defendant thereupon rested his case and the evidence was closed.

From the undisputed evidence given upon the trial there may be adduced the following:

Summary of Facts;

1. The note in suit was payable to the order of the Elmira National Bank and was without endorsement (p. 3).

2. The said note was made and delivered without consideration (pp. 10, 11, 26).

Summary of Facts.

3. The said note was made and delivered to said Robinson for the sole purpose of being used to aid in building a power house in Elmira, presumably, for the benefit of the properties in which the maker's employers were interested (pp. 10, 11, 23).

4. The said note was diverted from the use to which it was restricted by the maker, and was used with others of the same character, obtained in like manner, for the purpose of covering up an overdraft of the said Robinson at the said bank (pp. 20, 24–25, 26, 28).

5. But for the discount of said three notes, including the note in suit, said Robinson's account at said bank would have been overdrawn May 4th, 1893, about $50,000 (p. 28).

6. The said note was not discounted in the usual course of business, because the bank looked to said Robinson to pay the same, although he was neither guarantor nor indorser, and the bank did not take said note upon faith in the maker (p. 25).

7. The said bank parted with or advanced nothing in receiving the said note, and its discount was a mere bookkeeping transaction (p. 28).

8. The bank took the said note without knowing the maker or making inquiry as to his responsibility (pp. 20, 21, 25).

9. The officers of the bank knew that there was no consideration passing to the maker of said note from said bank (p. 20).

10. At the time the bank credited the said note to the account of said Robinson, he had procured to be discounted at said bank about $300,000, and was liable as maker upon $19,000 of notes, and as indorser in the further sum of $34,000, while the cashier had procured for the benefit of members of

his family the discount of paper to the amount of $107,000, the entire capital of the bank being but $200,000 (pp. 27–28).

11. The said Robinson controlled the policy of the said bank, and obtained discounts for himself personally and for the company of which he was president, through the cashier, without the knowledge of the directors' (pp. 12-14, 16, 18).

12. The said Robinson obtained the said notes, and the cashier of the bank discounted the same unlawfully, and the entire transaction was fraudulent and void.

Counsel for the plaintiff asked the Court to direct a verdict in favor of the plaintiff, to which the attorney for the defendant duly objected, and requested the Court to submit to the jury the several questions specified in the Assignment of Errors, (pp. 12–14, *post*) which the Court severally refused, and the defendant duly excepted (pp. 28–29).

The Court thereupon directed a verdict in favor of the plaintiff and against the defendant, for the amount of the said note, principal and interest, to which the defendant duly excepted (p. 29).

The jury thereupon rendered such verdict in the sum of $17,000 with interest from the 13th day of August, 1895 (p. 29).

Judgment was entered upon said verdict February 4th, 1896, in favor of the plaintiff and against the defendant for the sum of $17,535.63, being the amount due upon said note together with costs and disbursements (p. 9).

From this judgment a writ of error issued and the cause was brought up to the CircuitCourt of Appeals for the Second Circuit, and the judgment was affirmed on the 23d day of March, 1897 (pp. 36–37).

Error is assigned to the judgment of affirmance and the cause comes here for final review under the provisions of the Act of Congress of March 3d, 1891 (26 St. at L. 826).

Assignment of Errors.

The Assignment of Errors is as follows (pp. 37-38):

First.—The plaintiff in error assigns as errors the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said Circuit Court of Appeals.

Second.—The said Circuit Court of Appeals before which was heard the writ of error, which brought up the record in this action from the Circuit Court of the United States for the Southern District of New York to said Circuit Court of Appeals, erred in making its order on the 23d day of March, 1897, affirming the judgment of the said Circuit Court, and directing a mandate to issue to the Circuit Court of the United States for the Southern District of New York, directing that Court to proceed in accordance with the decision and order of said Circuit Court of Appeals.

Third.—And said Circuit Court of Appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said Circuit Court, and in not directing a new trial of the issues raised by the pleadings in said action.

The errors set out in the record in the Circuit Court of Appeals were the following (pp. 31-33):

1.

That the Circuit Court of the United States for the Southern District of New York erred in refusing to submit to the jury in accordance with the request of the attorney for the defendant, the question whether upon the evidence in the case the said note given by the said defendant had been diverted from the purpose for which it was obtained, to wit, to enable the said D. C. Robinson to obtain money from the proceeds of said note with others given at

the same time and in the same manner wherewith to build a power house at Elmira, N. Y., for the use of the corporation of which said Robinson was the president, and in which the firm by which the defendant was employed were interested, and said note was used for a different purpose, to wit, to apparently make good or cover up an overdraft of the said Robinson of long standing at the said Elmira National Bank.

2

The said Court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant the question whether under all the circumstances proved in the case, the Elmira National Bank took the said note in good faith, relying upon the contract of the defendant to pay the same.

3

That said Court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether or not said bank had notice or was put upon its inquiry as to whether there was any consideration passing to the defendant from either said Robinson or the payee named in said note, the said bank; and if put upon its inquiry whether said bank would have ascertained the fact that there was no consideration for said note and that it could not recover upon the same.

4

That said Court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether, in view of the erasure of the entry of the said notes upon the books of the bank first made May 5th, 1893, and the entry of the same as of May 4th, 1893, by the order of its cashier, the said bank acted in good faith, without notice of any infirmity in said

Assignment of Errors.

note and became a *bona fide* holder thereof for value.

5

That said Court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether the said fact of such erasure was not a circumstance tending to show the guilty complicity of the said cashier with the said Robinson in taking the said note under such circumstances as would point to his knowledge of the fact that there was no consideration passing to the maker of said note from the payee, the said bank, or from said Robinson.

6

That said Court erred in instructing the jury, as follows:

"*Gentlemen of the Jury.*—I cannot see anything in the facts of this case which legally take it out of the ordinary rule with regard to the liability of the maker upon an accommodation note. As I look at it now, I cannot find any material question of fact to submit to you, and you are therefore directed to render a verdict for the full amount of $17,000 and interest, which counsel can agree upon."

7

That said Court erred in directing a verdict in favor of the plaintiff and against the defendant for the amount of said note.

Charles F. Gale as receiver of said bank was substituted as defendant in error in place of said Charles Davis. deceased, by an order duly entered August 10th, 1896.

The circumstances in which the note in suit was made and the manner of its use were so extra-

Argument.

ordinary as to cause one to hesitate to dignify the instrument with the name of promissory note, or to invoke, as applicable thereto, the honored rules of law relating to commercial paper. The contract evidenced by the writing in suit was only a device to conceal the violation of a Federal statute, evidently concocted by the cashier of the bank and a director whose account was overdrawn. On its face the contract was only between the maker and the bank which was named as payee; there was no other party to the pretended contract. The payee knew that there was no consideration issuing from it to the maker of the note, and was put upon inquiry to ascertain whether there was any consideration passing to the maker from any other source which could make the note a valid contract. There was no such consideration, and there can be no recovery upon the note.

But to take up and discuss the exceptions, as they were taken upon the trial, suggests, in behalf of the plaintiff in error, the following:

Argument.

The statement of the facts proved upon the trial, all of which were undisputed, ought to be sufficient to convince this Court of the error committed by the Court of Appeals in sustaining the trial Court in refusing to submit to the jury the several questions proposed by the defendant's counsel for submission, and in directing a verdict against the defendant.

Points.

FIRST.

Robinson's transaction with the bank did not bind the maker of the note.

The Circuit Court of Appeals, in affirming the ruling of the Circuit Court, say:

"Assuming that there was enough in the circumstances attending the reception and discount of the paper by the bank to charge it with notice that the note in suit was an accommodation note made for the benefit of Robinson and, without other consideration, the bank was a purchaser for value and entitled to enforce it against the maker. That it was a purchaser for value, although it did not advance any money upon the note, but merely gave Robinson credit for the amount upon his precedent indebtedness, is entirely clear upon the authorities which prevail in this Court.

Swift *vs.* Tyson (16 Peters, 1); National Bank of the Republic *vs.* Brooklyn City Railway Co. (14 Blatch., 242), affirmed 102 U. S., 14. * * *

The note having been made for the purpose of being discounted by the Elmira National Bank and having been used for that purpose by Robinson, effected the substantial object for which it was designed. Robinson did not promise the defendant or the makers of the other notes, to use the avails in any particular way; and as none of the makers had the remotest concern in the building of the power house or in his disposition of the avails, his statement of the reasons, which led him to apply for aid and of the use for which he wanted it, was not of material matter, and could not have been in a legal sense an inducement for the accommodation. The case is quite analogous to Mohawk Bank *vs.* Corey (1 Hill, 513). The evidence was wholly insufficient to charge Robinson with a fraudulent

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diversion of the paper and the trial Judge correctly refused to submit any issue involving that question to the jury."

Opinion, WALLACE, P. J., (p. 36).

It will be noticed that the Court considered the case one involving the rules governing accommodation paper; and this conclusion, it is submitted, was unauthorized for the reasons hereinafter stated; and therefore the Circuit Court erred in directing a verdict for the plaintiff.

The theory upon which the trial Court proceeded and which was affirmed by the Circuit Court of Appeals was, it is submitted, wholly wrong.

The note in suit was not an accommodation note.

In the case of Bradshaw *vs.* Miners' Bank of Joplin (81 Fed., 902). the appellants Bradshaw and Henry had purchased certain property of a Lead and Zinc Company, for which they had executed their promissory notes to the Miners' Bank, which it was averred had no interest of its own in the notes, but was made payee at the request and solely for the benefit of the Zinc Company. At the same time one Thompson had executed to the bank a guarantee of payment of the notes. A judgment having been obtained on the guarantee against Thompson, Bradshaw and Henry brought suit in equity to enjoin the prosecution of a creditor's bill filed by the bank against Thompson to enforce collection of the judgment. Said the Circuit Court of Appeals, per WOODS, J. (at p. 904):

"It is urged on the authority of Railroad Co. *vs.* National Bank (102 U. S., 14), and other cases which follow Swift *vs.* Tyson (16 Pet., 1), that the Miners' Bank, on the facts alleged, became an in-

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nocent holder for value of the notes of the appellants, and that its right to enforce the guaranty cannot be affected by an inquiry into the consideration of the notes. The doctrine of Swift *vs.* Tyson, so far as we know, has never been applied in the manner proposed. It is averred in the bill that the notes were made payable to the Miners' Bank as agent or trustee for the Illinois & Missouri Lead & Zinc Company, but, if that were not so, and the beneficial interest in the notes were in the bank, yet the title, having come to it as the original payee of the notes, and not as transferee, would be subject, we suppose, to all infirmities in the original consideration between appellants and the Illinois & Missouri Lead & Zinc Company, unless in the circumstances and conditions of the transaction there was in favor of the bank an estoppel in equity. There is none in the law merchant."

This case is of particular value in its explanation and limitation of the application of the two cases in this Court principally relied on by the Court below.

The same position is also taken by the Supreme Court of the Territory of Oklahoma in the case of Hagan *vs.* Bigler, 49 Pac. Rep., 1011. The suit was commenced upon a promissory note for $500, payable on or before one year after date, executed by Hagan and wife to the order of Ella Bigler. The answer was a failure of consideration and also that the note had never been delivered. On the trial of the cause it appeared on the defendants' behalf that an agreement in the case of Frank Bigler against Hagan had been entered into providing that this action, which was brought to dissolve the partnership affairs between them, should be dismissed by Bigler; that the plaintiff should pay all the costs of either party in the said action,

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except the defendant's attorney's fees; that the Court should make an order upon the Receiver to pay over all moneys which he had received from the sale of the partnership property and turn over the unsold property to Hagan. Hagan and his wife were to dismiss and did dismiss, another action pending between Martha Hagan and H. B. Mitchell, Receiver of the firm of Hagan & Bigler. The agreement also recited: "In consideration of the turning over of said moneys and delivery of said unsold property to Joseph Hagan, the said Joseph Hagan has this day executed and delivered to Frank Bigler his certain promissory note for $500." For the purpose of showing that subsequent to the making of the agreement a parol agreement was entered into between the parties by which the note should be made payable to Ella Bigler and should be placed in the hands of one Jones to be delivered to her when and not until the moneys and property in the hands of the Receiver should be turned over to Hagan and the costs in the action paid by Bigler, the defendant offered evidence showing that the note was placed in the hands of Jones and that although the moneys and property in the hands of the Receiver had never been in fact turned over to Hagan, the note was delivered by Jones to Mrs. Bigler, without the knowledge of Hagan. The Court below had refused to permit evidence of the subsequent parol agreement or that the terms of the original agreement had not been complied with. On appeal the Supreme Court sustained the exception taken by the defendant to the refusal of the trial Court to admit the evidence mentioned, and in the course of a well sustained opinion by TARSNEY, J., said:

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"The cause seems to have been tried upon the theory that the plaintiff was an innocent holder of said note, free from any equitable defenses. It may be stated, generally, that the *bona fide* holder takes negotiable paper free from all equitable defenses—that is, those defenses which do not appear on the face of the paper, and which do not absolutely destroy the existence of the paper as a monetary obligation. But who are the *bona fide* holders? The payee of a note is not a *bona fide* holder. A *bona fide* holder of a negotiable instrument is one to whom the instrument has been transferred by the payee, or by some subsequent indorsee, for value and before due, and without notice of any defect in the instrument. The law relating to *bona fide* or innocent holders of negotiable paper does not apply in actions between the maker and the payee. Between the original parties, any equitable defense may be interposed by a maker. He may show that the note was never delivered. He may show an entire or partial failure of consideration. He may show that an agreement or contract upon the part of the payee, which was of the consideration for the note, has never been kept."

A glance at the case of Mohawk Bank *vs.* Corey, 1 Hill, 513, relied on by the Circuit Court of Appeals, is sufficient, it is submitted, to show its inapplicability to the case at bar.

In the case cited the payee had sued the maker and accommodation endorsers of a note which was discounted by the bank payee, and actual value *received by the drawer*. The accommodation endorsers sought to raise the question that the proceeds of the note had been misapplied, and it was, of course, held that having no interest in the purpose for for which the funds were to be used, their defense, in view of the ample consideration *received from the bank by the maker of the note was unavailable.*

In the case at bar it is not for a moment claimed

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that Israel ever received any consideration for making the note, nor were there any accommodation endorsers.

Whether or not the maker and Robinson may have intended it as an accommodation note, they did not carry out such intention, and the note in suit is not made in form an accommodation note. It is a note made payable directly to the order of the bank. It had no inception until it was delivered to the bank (Messmore *vs.* Meyer, 56 N. J. L., 31; 27 Atl. Rep., 938); and even then it had no validity unless some consideration therefor passed either directly from the bank to the maker, Israel, or to some other person upon the order of the maker. It is undisputed on the record that the maker, Israel, never had any personal transaction with the bank, and, therefore, no consideration can have passed directly to him from the bank. It is also undisputed that the only intermediary between the maker and the bank was Robinson. If Robinson was not authorized to act in the premises, then the note never had an inception. If Robinson was authorized to act, it must have been either as agent for the maker, or as agent for the bank (Messmore *vs.* Meyer, *supra*).

The facts in the case above cited were as follows: The defendants who, at that time, were nowise in debt to the plaintiff, at the request of one Simmons, for his (Simmons's) and plaintiff's accommodation, gave their note to plaintiff for the sum of $7,500. They took back a receipt from Simmons stating that the note was made for the accommodation of plaintiff and Simmons. Simmons was in debt to plaintiff $7,500 on a note that was past due. Simmons delivered the note in suit to plaintiff. *Held*,

Points.

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that the note was an accommodation note as between plaintiff and defendants. MAGIE, J., in giving the opinion of the Court, says:

"But it was made payable to plaintiff's order, and it came into legal existence either when defendants delivered it (the note) to Simmons, or when Simmons delivered it to the plaintiff. If the delivery of the note by defendants to Simmons gave it existence, it is obvious that Simmons was the agent of the plaintiff to accept delivery. Plaintiff, therefore, was bound by his acceptance, which was for the accommodation of himself and Simmons.

If the delivery of the note by Simmons to plaintiff gave it existence it is obvious that Simmons was the agent of the defendants. He was not, however, a general agent, but a special agent intrusted with the note to deliver to plaintiff as an accommodation to him and Simmons. His authority was thus limited and no representations of Simmons could enlarge that authority. As the note was made payable to plaintiff, to whom defendants were not indebted at all, the possession of it did not tend to hold out Simmons as possessed of greater authority than that actually conferred upon him. In either view plaintiff must be considered as having taken the note for his accommodation, and therefore, he acquired no right of action thereon against defendants."

If Robinson was the agent of the bank, the bank is bound by his knowledge of the actual conditions under which the note was signed by the maker. If Robinson was the agent of the maker, he was bound by the terms of his agency. If such agency existed what were its terms? Israel, the maker, testified that he gave the note to Robinson to assist him in raising money to complete a power house for The Elmira Municipal Improvement Co., at Elmira, N. Y. This testimony stands undisputed, and must be taken as disclosing the terms of the agency.

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Robinson, in any view of the case, can be held to be no more than the special agent of the maker, to conduct this particular transaction and no other. The maker had not held him out to be his agent; he had not communicated to the bank either directly or indirectly the fact of such agency. The bank learned such fact, if at all, from Robinson; and the bank dealing with Robinson as such special agent of the maker, relying solely upon his representations as to his authority, did so at its peril and cannot hold the principal, Israel, if the agent, Robinson, acted without the scope of his authority.

"Parties dealing with an agent assuming to be authorized to draw, accept or indorse negotiable paper, must see to it that his authority is adequate and both they and the agent must keep strictly within the limits fixed to the agent's authority or the principle will not be bound. Thus authority to draw and discount a note for a given purpose implies no power to draw and discount one for another and different purpose."

Mechem on Agency, Sect. 393.

"The general rule, that when an attorney does any act beyond his power, it is void even as between the appointee and the principal, has always prevailed, and is indeed elementary in the doctrine of powers. The ground on which the rule rests is familiar. The appointee need not deal with the attorney unless he choose; and it is very reasonable that he should be bound to inspect the power, when in writing, or to learn its language in the best way he can, when it is by parol. On becoming acquainted with it he shall be holden to understand its legal effect, and must see, at his peril, that the attorney does not transgress the prescribed boundary in acting under it.

Opinion, Cowan, J., in North River Bank *vs.* Aymar, 3 Hill, 262, 266.

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And again at page 274:

"In the cases cited, the question in debate was, whether by authorizing the agent to issue notes in the name of the principal, without words expressly restricting the issue to his own business, he did not confer the power of issuing them for everybody, even including the attorney. That the power was to be thus construed was contended in the case before us, and in Stainer *vs.* Tysen. We have arrived at the conclusion without much difficulty, that to give the power so great an effect, the principal must go farther and expressly declare his meaning that the attorney may use his notes for the benefit of others besides the principal."

"The plaintiff's testator, taking the notes in suit, made by an agent professing to represent the defendants as his principal, is presumed to have known the terms of the power under which the agent assumed to act. He was bound to ascertain and know the character and extent of the agency, and the words of the instrument by which it was created, before giving credit to the agent. If the testator dealt with the agent without learning the extent of the powers delegated to him, he did so at his peril, and must abide by the consequences, if the agent acted without or in excess of his authority."

Opinion, ALLEN J.,
Craighead *vs.* Peterson, 72 N. Y., 279, 283.

"It is, of course, correct to say that if a principal puts his agent in a position to impose upon an innocent third person, by apparently pursuing his authority, he shall be bound by his acts. It is, however, equally true that one dealing with an agent must look to the extent and scope of his agency, and that an implied or ostensible agency is never to be construed to extend beyond the obvious purpose for which it is apparently created."

Wheeler *vs.* Northwestern Sleigh Co., 39 Fed. Rep., 347, 349, opinion by JENKINS, J.

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In Dowden *vs.* Cryder, 55 N. J. L., 329; 26 Atl. Rep., 941 (Ct. Errors and Appeals, N. J.), the facts were as follows:

E. H. Carmack drew a draft on the defendant for $3,200 payable four months after date to his own order, and defendant accepted it for Carmack's accommodation. Thereupon Carmack indorsed it, and delivered to one Barnett, with authority to negotiate it for cash at a reasonable discount. Barnett transferred it to the plaintiff for $2,060 and a diamond necklace, valued at $1,000, and then absconded. At the time of the transfer the plaintiff knew that Barnett was not the owner of the draft, but held it merely as agent of Carmack for negotiation. Carmack repudiated the transfer, and the draft went to protest; hence the suit. In the opinion, DIXON, J., says, page 942:

"The defect found in the plaintiff's title sprang, not from the law relating to commercial paper, but from the law of agency. It is a universal principle of the law of agency that the powers of the agent are to be exercised for the benefit of the principal and not of the agent or third parties. Persons dealing with one whom they know to be an agent, and to be exercising his authority for his own benefit, acquire no rights against the principal by the transaction" (citing Stainer *vs.* Tysen, 3 Hill, 279; Bank *vs.* Underhill, 102 N. Y., 336, and other cases). * * * "The declarations of an agent, although accompanying his acts, constitute no evidence of the extent of his authority" (citing, among others, Story on Agency, Sect. 136; Farmers' Bank *vs.* Butchers' Bank, 16 N. Y., 134).

And again he says, at page 143: "In our view of the evidence, the trial might properly have been concluded by a direction that the jury find a verdict in favor of the defendant. Barnett was only a special agent, and his authority was to negotiate the draft for cash at a reasonable discount. This

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did not authorize him to negotiate the draft for cash and merchandise. The plaintiff dealt with him as agent, and was therefore bound to ascertain the extent of his power. * * * The contract between the plaintiff and the agent having been beyond the agent's authority, it gave the plaintiff no rights against the principal."

Not only must the bank be held to be bound by the actual terms of the agency, if any, which existed between the maker and Robinson, but the crediting of the proceeds on the books of the bank to the overdrawn individual account of the agent was actual knowledge on the part of the bank that the proceeds of the note did not go to the maker. Payment by A to C is not payment by A to B, unless B has authorized the payment by A to C on his account. The burden of proof is on A to show such authority from B to make the payment to C. The burden of proof, in the case at bar, was on the bank to show that Israel, the maker of the note, had authorized the crediting of the proceeds of the note to the overdrawn account of Robinson. This the bank did not attempt to show, and it appears from the testimony of the defendant's witnesses that such was not the case.

The motion of the plaintiff in the Court below that the Court direct a verdict in his favor, and against the defendant, should have been denied for the reasons already assigned in support of the several requests preferred by said defendant for submission to the jury of the questions proposed, and because the entire transaction is "repugnant to the morals of the times."

The defendant in error cannot successfully invoke the time-honored rules of commercial law as applicable to this case, and the note in suit comes within the following rule :

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"If the contract bind the maker to do something opposed to the public policy of the State or nation, or conflict with the wants, interests or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, it is void, however solemnly the same may be made."

Rule II, Greenhood's Doctrine of Public Policy in the Law of Contracts.
See also Rules X, CCCCLXVIII, *id.*
Swords *vs.* Owen, 43 How. Pr., 176.
Fowler *vs.* Scully, 72 Pa. St., 456.
O'Hare *vs.* Sec. Nat. Bank, 77 *id.*, 96.
Bly *vs.* Sec. Nat. Bank, 79 *id.*, 453.
Mapes *vs.* Sec. Nat. Bank, 80 *id.*, 163.
Nassau Bank *vs.* Jones, 95 N. Y., 115.

SECOND.

The note in suit was without consideration, and never had a legal inception.

It will not be disputed that between the immediate parties to a contract it may be shown that there was no consideration; and that the maker and payee of a promissory note are such immediate parties.

Daniel on Negotiable Instruments, § 174.
Wilson *vs.* Ellsworth, 25 Neb., 246; 41 N.W. Rep., 177.
Eastman *vs.* Shaw, 65 N. Y., 522.

The paper was what ABBOTT, Ch. J., in Downes *vs.* Richardson, 5 Barn. & Ald., 657 (7 Com. Law Rep., 227), terms "an unavailable instrument," and

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"the principal parties to it had no right of action *inter se.*"

See also

Daniel on Negotiable Instruments, § 191.
Arden *vs.* Watkins, 3 East, 317.
Wills *vs.* Freeman, 12 East, 656.
Sec. Nat. Bank *vs.* Howe, 40 Minn., 390.

The defendant in error made no attempt upon the trial to show that any consideration passed to the maker of the note, except by the cross examination of the maker, and such cross examination but strengthened the evidence given upon his examination in chief. This was an evident attempt to show that Robinson paid or was to pay something to the maker of the note by way of consideration. The plaintiff was bound to know that no consideration passed from the payee to the maker.

That there can be no recovery in such a case, there is abundant authority.

The case of Vorce *vs.* Rosenbury, 12 Neb., 448, was one in which the alleged consideration moved, not from the payee, but from a third party, creditor of the maker, who caused the note to be executed to the payee. The Court said:

"The notes sued on here although negotiable, were never negotiated, nor were they transferred to the plaintiff in error in the usual course of business. The defendant in error testified on the stand that he had never seen Mr. Vorce (the maker) when the notes were executed, had never had any dealings or business transactions with him; he was not present. So we think that the making of these notes payable to Mr. Vorce, under the circumstances, was a very unusual transaction."

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In Evansville National Bank *vs.* Kaufmann, 93 N. Y., 273, RUGER Ch. J., at page 291, said:

"If no liability is incurred in favor of a third party unless he has parted with value, much less can it be claimed that it is in favor of an original party to the contract, from whom, as is shown affirmatively, no consideration whatever proceeded."

In Smith *vs.* Weston, 88 Hun, 25, a note payable to one who was indebted to the plaintiff was indorsed by the payee and another, and was used by the payee in renewal of another promissory note of like amount, made by the same makers, and indorsed in like manner. In was *held* that the plaintiff could not recover against the second indorser.

The Court said (p. 514):

"Taking the note directly from the makers, in renewal of a loan previously made to them was evidence to the plaintiff that the defendant's indorsement was for the maker's accommodation and without consideration."

Not only was the note without consideration between the immediate parties, but the discount thereof by the bank furnished no consideration to Robinson, who procured such discount.

Mr. Daniel in his work on Negoiatable Instruments says:

"§ 779c. *The apparent purchase must have been a purchase in fact, and not a mere bookkeeping entry.* Mere discount and credit do not of themselves constitute a *bona fide purchaser* for value. To occupy that position the holder must actually have parted with something of value for the note."

Citing

Manufacturers' Nat. Bank *vs.* Newell, 71 Wis., 312.

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In Platt *vs.* Chapin, 49 Barb., 318:

"A check was made for the accommodation of the payees who paid nothing therefor, and who having received it deposited it in the Stuyvesant Bank duly endorsed by them, the bank crediting them upon its books with the amount thereof."

The Court continued:

"The statement of the case would seem to be conclusive argument against the right to recover. The bankrupt institution which the plaintiff represents has never parted with a cent, and if a recovery is to be had it is upon the technical ground that the valueless credit it gave upon the books to the payees of the check made it a *bona fide* holder of the instrument * * * It has in fact parted with nothing, and the credit it gave the payees represents really nothing."

In Hume, Webster & Co. *vs.* The Howe Machine Co., 54 Conn., 394, a draft was discounted and applied to an existing indebtedness of the drawer to the plaintiffs, they not discharging the debt or relinquishing anything of value.

Held, that by the law of New York the plaintiffs were not *bona fide* holders for value.

PARDEE, J., said:

"There is neither claim nor proof nor ground for the assumption that they agreed to or did release A. B. Stockwell (the drawer) from any portion of his liability to them upon their book account against him by the mere reception of the draft and the credit upon that account of the proceeds resulting from the endorsement and sale thereof. There is no proof of any express, and there can be no assumption of any implied agreement that it was received in absolute payment and satisfaction, or in discharge of any portion of the drawer's liability to them; no proof nor presumption that upon dishonor of the bill they could not have enforced to the fullest extent their original account against

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him; no proof that upon the reception of the draft they parted with any right or property; no proof that they are not now in every respect in as good condition as if they had not received it."

"The true question in all such cases is, 'Did the holder part with value for the bill or not?' If not, then he is not to be treated as a *bona fide* holder for value; * * * if there is no agrement that it is taken in extinguishment of the indebtedness, so that the debt is not legally discharged, he has parted with nothing and is not a holder for value."

Edwards on Bills and Notes, § 452, citing:

Spear *vs.* Meyers, 6 Barb., 445.
White *vs.* Springfield Bank, 1 *id.*, 225.
Stewart *vs.* Small, 2 *id.*, 459.
Young *vs.* Lee, 18 Barb., 187.
Phoenix Ins. Co. *vs.* Church, 81 N. Y., 225.
Atlantic Nat. Bank *vs.* Franklin, 55 N. Y., 235.

See also—

Thompson *vs.* Sioux Falls Nat. Bank, 150 U. S., 231, 244.
Dresser *vs.* M. & I. R. R. Co., 93 U. S., 92.
Lancaster Nat. Bank *vs.* Haver, 114 Pa. St., 216.
Dougherty *vs.* Cent. Nat. Bank, 93 Pa. St., 227.
Clark *vs.* Nat. Bank of Albion, 52 Barb., 592.
Drilling *vs.* First Nat. Bank, 23 Pac. Rep., 94.
Balbach *vs.* Frelinghuysen, 15 Fed., 675.
Sixth Nat. Bank *vs.* Lorillard Brick Works, 46 N. Y. State Rep., 235 (18 Suppl., 861).

Higgins vs. Ridgway, 153 N. Y. 130.

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In the case last cited the Court said :

"The bookkeeping entries constitute no parting with value, within the rule making a plaintiff a *bona fide* holder so as to exclude existing equities between the parties. (Phoenix Ins. Co. *vs.* Church, 81, N. Y., 218; McQuade *vs.* Irwin, 39 Supr. Ct., 396; Buhrman *vs.* Baylis, 14 Hun, 608.)"

THIRD.

The Trial Court should have submitted to the jury the question whether the note in suit had been diverted from the purpose for which it was given by the maker.

The Circuit Court of Appeals held (p. 36).:

"The note having been made for the purpose of being discounted with the Elmira National Bank, and having been used for that purpose by Robinson, effected the substantial object for which it was designed."

This conclusion, it is submitted, is unauthorized. There were sufficient facts to at least authorize and require the Circuit Court to submit to the jury the question whether the note had been diverted from the purpose for which it was given.

The purpose for which the plaintiff in error was induced to give to Robinson the note in suit was to enable said Robinson to finish the building of the power house in Elmira, for the benefit of The Elmira

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Municipal Improvement Company, of which said Robinson was the president, and in which the employers of the plaintiff in error were interested. Upon receiving the note the bank parted with nothing. The discount of the note was a mere bookkeeping transaction for the purpose of covering up Robinson's overdraft. The cashier testified that he looked to Robinson to pay the note, if the maker did not, and, in support of this evident understanding between the cashier and Robinson, the latter subsequently executed a guaranty in writing of said note. The diversion of the note shifted the burden of proof upon the holder, and became a question for the jury; and in considering this question the rule of decision under the statutes of New York is controlling.

Patent Title Co. *vs.* Stratton, 89 Fed., 174.

Mr. DANIEL, in his work on Negotiable Instruments, says:

"§ 791. *The rule in New York.* There it is held that a diversion is such a fraud as to shift the burden of proof upon the holder."

Citing:

Farmers' & Citizens' Nat. Bank *vs.* Noxon, 45 N. Y., 762.
Grocers' Bank *vs.* Penfield, 7 Hun, 279.
Moore *vs.* Ryder, 65 N. Y., 439.
Spencer *vs.* Ballou, 18 N. Y., 331.
Schepp *vs.* Carpenter, 51 N. Y., 604.
Comstock *vs.* Hier, 73 N. Y., 270.

And again, in the same section:

"The fraud which shifts the burden of proof

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must be in the consideration, or *representations used in obtaining the execution of the instrument.*"

In the next section this author defines a misappropriation as "a fraudulent diversion from the original object and design."

It was held in the case of Benjamin *vs.* Rogers, 126 N. Y., 70, that the surety "may always fix the precise terms upon which he is willing to become a surety, whether those terms seem to be material ro immaterial."

In the case of United States National Bank *vs.* Ewing, 131 N. Y., 506, the indorser of a promissory note for accommodation was assured that the note would be negotiated in Kentucky. The note was transferred by the maker to the plaintiff bank as security upon a precedent debt.

FINCH, J., said (p. 507):

"The holder parted with nothing upon receiving it, surrendered no right and no security, and made no new agreement in reliance upon it. In its hands it was therefore open to the defense that, made for one purpose, it had been used for another, and that its diversion had served to discharge the indorser. * * * The restriction here does not seem to be material, and yet may have been so in the mind of the indorser and for reasons sufficient to him. * * * If his testimony, read in connection with the writing (the note), left possible the inference that no restriction was intended, the inference was one of fact and not of law, and should have been left to the judgment of the jury."

See also:

Bruyn *vs.* Russell, 60 Hun, 280.
Wardell *vs.* Howell, 9 Wend., 170.
Farmers', etc., Bank *vs.* Hathaway, 36 Vt., 539.

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FOURTH.

The facts proved upon the trial were sufficient to require the submission to the jury of the question of the good faith of the bank in taking the note in suit, and it was error in the trial Court to refuse to submit the question to the jury.

Upon the question of the *bona fides* of the bank, the plaintiff in error made four distinct requests for submission to the jury, all of which were severally refused by the trial Court, and each refusal has been duly assigned as error (see Assignment of Errors in Circuit Court, 2, 3, 4, 5 pp. 3 and 33). These questions were :

(1.) Whether, under all the circumstances in the case, the bank took the said note in good faith, relying upon the contract of the maker to pay the same ?

(2.) Whether or not said bank had notice, or was put upon inquiry as to whether there was any consideration passing as to the maker of the note from either Robinson or said bank ; and if put upon inquiry, whether said bank would have ascertained the fact that there was no consideration for said note, and that said bank could not recover upon the same ?

(3.) Whether, in view of the erasure of the entry of the note in suit with the two others upon the books of the bank, first made May 5th, 1893, and the entry of the same as of May 4th, 1893, by the order of the cashier, the said bank acted in good faith, without notice of any infirmity in the note, and became a *bona fide* holder thereof for value ?

(4.) Whether such erasure was not a circumstance

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tending to show the guilty complicity of the cashier with Robinson in taking the note under such circumstances as would point to his knowlege of the fact that the note was without consideration?

The Circuit Court of Appeals said (Opinion, p. 35):

"Assuming that there was enough in the circumstances attending the reception and discount of the paper by the bank to charge it with notice that the note in suit was an accommodation note made for the benefit of Robinson and without other consideration, the bank was a purchaser for value and entitled to enforce it against the maker."

This statement, it is submitted, not only proceeds upon a wrong theory, but does not cure the error of the trial Court above referred to.

The witnesses from whom were obtained the story of the manner in which the affairs of the bank were conducted, and the important part which the worthless paper of the plaintiff in error and his fellow-clerks was made to play, were all connected with the wrecked bank, and were evidently counseled by caution in the testimony which they gave. Yet it was established upon undisputed evidence that some months before the failure of the bank the Comptroller of the Currency had discovered and complained of an overdraft in Robinson's individual account; that all of Robinson's discounts were obtained *through the cashier;* that the aggregate amount of discounts obtained by Robinson and unpaid at the time of the failure of the bank was about $300,000, while the cashier had obtained for members of his family about $107,000; that said Robinson's individual account had been almost constantly overdrawn for six weeks prior to May 4th, 1893, and that on April 25th, 1893, such

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overdraft amounted to $137,314; that the overdraft was $35,400.60 the night before the final entry of the discount of said notes, and that but for such entry said Robinson's account would have been overdrawn May 4th, 1893, about $50,000; that it had been the custom of the bank to take such paper as its customers offered; that the cashier's instructions from his superiors were "take care of" Robinson's account; that he would not have a right to refuse to take the paper of directors to the amount of the said three notes; that the cashier knew nothing about the makers of these notes, and *made no inquiries as to their responsibility;* that the alteration of the books of the bank to show the entry of such discount as of May 4th instead of May 5th, was made by telephonic order of the cashier from New York, for the evident purpose of concealing the overdraft from the Comptroller of the Currency, and the notes had been obtained prior to the date which they bore, in order to be in readiness for such use; that *they were executed in New York but were in the bank at Elmira the day of their date.*

In the words of RUGER, Ch. J., in Canajoharie Nat. Bank *vs.* Diefendorf, 123 N. Y., 191, at page 206, the conduct of the cashier was "unusual, imprudent and inconsistent with the character which he seeks to maintain as a *bona fide* holder."

This array of facts wrung from unwilling witnesses, together with the positive proof given by the maker of the note that it was without consideration, and was executed and delivered upon representations that it was to be used for quite another purpose, was sufficient to shift the burden of showing good faith upon the holder of the note, and to entitle the maker of the note to

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go to the jury upon the question of the good faith of the holder.

In such circumstances the question of *bona fides* is for the jury.

Canajoharie Nat. Bank *vs.* Diefendorf, 123 N. Y., 191.
Vosburgh *vs.* Diefendorf, 119 N. Y., 357.
Kavanagh *vs.* Wilson, 70 N. Y., 177.
Joy *vs.* Diefendorf, 130 N. Y., 6.
Farmers' and Citizens' Nat. Bank *vs.* Noxon, 45, N. Y., 462.

In Canajoharie Nat. Bank *vs.* Diefendorf, *supra*, the Court of Appeals, per RUGER, Ch. J., at pp. 200, 206, said, referring to the intent of the cashier in the transaction, that it was "co-extensive with that of the plaintiff (the bank), and brings him directly within the cases which hold that the credibility of such a witness" is a question for the jury (Elwood *vs.* W. U. T. Co., 45 N. Y., 549; Honegger *vs.* Wettstein, 94 N. Y., 252). * * *

Such evidence is also for the jury where the evidence of the witness shows *his conduct to have been unusual, imprudent and inconsistent* with the character which he seeks to maintain as a *bona fide* holder (Stilwell *vs.* Carpenter, 2 Abb. N. C., 239; Moody *vs.* Bell, *id.*, 275; Kavanagh *vs.* Wilson, 70 N. Y., 177)."

In Union Bank *vs.* Gilbert, 90 Hun, 417, 419, where the principal issue depended upon the testimony of the plaintiff's cashier, it was *held* upon the authority of Canajoharie Nat. Bank *vs.* Diefendorf, *supra*, that the truthfulness of the testimony of the cashier was for the consideration and determination of the jury, and not for the Court.

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It is difficult to understand why the trial Court did not refuse to direct a verdict in favor of the plaintiff, upon the note in suit, and upon its own motion, because there was no controversy as to the facts, direct a verdict in favor of the defendant; but it is incomprehensible that the Court should deprive the defendant of his right to go to the jury upon the questions of good faith, and notice to the bank of the infirmity of the paper.

The plaintiff was unable upon the cross-examination of defendants' witnesses to prove a single fact which tended to establish the good faith of the bank, or the existence of any consideration, and utterly failed throughout the entire case to make any showing which could justify the refusal of the trial Court to submit the case to the jury. The defendant was therefore entitled to have the case submitted to the jury.

American Exchange National Bank *vs.* New York Belting & Packing Co., 148 N. Y., 698.

The rules of law which support the contention of the plaintiff in error are elementary, and should have been readily recognized by the trial Court as applicable to the facts proved upon the trial.

The circumstances in which the bank took the note in suit are inconsistent with good faith, and until good faith is established there can be no recovery upon the note.

The said note having been obtained through fraud and without consideration, the *onus* was upon the holder of showing that the bank acquired the same in good faith.

Am. Exch. Nat. Bank *vs.* N. Y. B. & P. Co., 148 N. Y., 698.

Grant *vs.* Walsh, 145 N. Y., 502.

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Joy *vs.* Diefendorf, 130 N. Y., 6.
Canajoharie Nat. Bank *vs.* Diefendorf, 123 N. Y., 191, 205.
Vosburgh *vs.* Diefendorf, 119 N. Y., 357, 364.
Nickerson *vs.* Ruger, 76 N. Y., 282.
Bank *vs.* Carll, 55 N. Y., 441.
First Nat. Bank *vs.* Green, 43 N. Y., 298.
Daniel on Negotiable Instruments, § 819.

Bad faith may be predicated upon guilty knowledge, willful ignorance and various circumstances surrounding the transaction.

It does not matter whether the cashier of the bank had guilty knowledge of the fraud through complicity with Robinson, or closed his eyes to his duty to the stockholders of the bank and remained willfully ignorant of Robinson's transactions because of his alleged "instructions" from his "superior officers."

In the case of Murray *vs.* Lardner, 2 Wall., 110, Mr. Justice SWAYNE, at page 121, said:

"The rule may be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith."

Chief Justice CHURCH, in the case of Dutchess Co. M. Ins. Co. *vs.* Hachfield, 73 N. Y., 226, at page 228, said:

"Bad faith is predicated upon a variety of circumstances, some of them slight in character, and others of more significance."

Judge ALLEN, in Hall *vs.* Wilson, 16 Barb., 548, at page 550, said:

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"To entitle the holder of negotiable securities which have been fraudulently, feloniously or *without consideration* obtained and put in circulation, to the benefit of this rule (*i. e.*, that of *bona fide* [illegible]), he must have become such holder in good faith, for a full and fair consideration, in the usual course of business, and without notice of the defect or infirmity in the title."

In Canajoharie Nat. Bank *vs.* Diefendorf, *supra*, RUGER, Ch. J., said at p. 202:

"The requirement of good faith is expressed in the very term by which a holder is protected, and is fundamental in the maintenance of that character (1 Parson's on Bills & Notes, 258)."

See also

Seybel *vs.* National Currency Bank, 54 N.Y., 288.

This rule is also recognized in England; see

Goodman *vs.* Harvey, 4 Ad. & El., 870.

Whether the notice of the fraud to the bank, through its cashier, was actual or constructive, it is equally antagonistic to the claim of good faith. It goes without saying, that if the bank had been informed by the maker of the note that it was without consideration and would not be paid, the bank would not have been a holder in good faith and could not recover. In the case at bar, there were sufficient indications to put the bank upon inquiry, and in the circumstances of this case, as in all others similar to it, "inquiry as to the facts is a moral duty, and diligence an act of justice."

Daniel on Negotiable Instruments, §§ 795, 795*a*.

Angle *vs.* N. W., etc., Ins. Co., 92 U. S. 342.

Points.

FOURTH. *The question of the bona fides of the bank was for the jury.*

Mr. DANIEL in his work on Negotiable Instruments, says:

§ 795*b*. *Constructive notice from extrinsic circumstances.* "The circumstances of the transaction may be of such a character as to intimate strongly a defect in the title, and if they are such as to invite inquiry, they will suffice, *provided the jury think* that abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the paper. Then, indeed, his *bona fides* would be impeached. But further than this, gross negligence, which is not in itself proof of *mala fides*, may be so great as to amount to proof of notice. 'I agree,' says Baron Parke, 'that notice and knowledge mean not merely express notice, but knowledge or the means of knowledge to which the party willfully shuts his eyes.'"

To cite further from Mr. DANIEL'S work:

"§ 799. *Particular and general notice.* It is quite clear and well settled that the purchaser need not have notice of the particular fraud, or equity or illegality, in order to be affected by it. It is sufficient that there be notice, actual or constructive, that there is some fraud, or equity or illegality affecting the original parties." * * * *If it can be collected by a jury* from circumstances fairly warranting such an inference that *he knew*, or believed, or thought that the bill was tainted with illegality or fraud, such a * * notice will * * destroy the title" (Citing and quoting from Byles [Sharswood's Ed.], 119, 226).

See also *id.* § 801.

"It will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry."

Story on Promissory Notes, § 197.

Points.

FOURTH. *The question of the bona fides of the bank was for the jury.*

"If the circumstances are of such a character as to create a distinct legal presumption and *prima facie* proof of fraud, or of some equity between prior parties, it would operate as legal information and constructive notice to the transferee."

Daniel on Negotiable Instruments, § 796.

See also

Nat'l Park Bank *vs.* Remsen, 43 Fed., 226.

In American Exchange Nat. Bank *vs.* New York Belting and Packing Company, 148 N. Y., 698, the Court of Appeals of New York, per GRAY, J. (at p. 705), said:

"In all cases where it is sought to defeat the right of the holder of negotiable paper before maturity to recover against the maker, it is essential that actual notice be proved of the defect in title, or that *circumstances* be shown *evidencing bad faith in the holder* and *creating reasonable grounds for suspecting his conduct* in the transaction."

See also

Witter *vs.* Sowers, 32 Fed., 762.
Loring *vs.* Brodie, 134 Mass., 453.
People's Nat. Bank *vs.* Clayton, 66 Vt., 541.
Palmer *vs.* Field, 76 Hun, 230.
Garfield Nat. Bank *vs.* Colwell, 57 Hun, 169.
Produce Bank *vs.* Bache, 30 Hun, 351.
In re Carew's Estate, 31 Beav., 39.

Even gross carelessness constitutes evidence of bad faith; and where it is claimed to exist, the

Points.

FOURTH. *The question of the bona fides of the bank was for the jury.*

question of good faith is for the jury, and is not a question of law for the Court.

Cunningham *vs.* Scott, 90 Hun, 410.

The authorities upon the question of good faith are carefully reviewed in the case of Cheever *vs.* The Pittsburg, etc., R. R. Co., 28 App. Div. (N. Y.), 81, where the Court says (p. 90):

"Even where the evidence is not conclusive *if it tends to establish* (italics by the Court), the lack of good faith it should be submitted to the jury; and the jury are authorized to draw such inference from the facts proved as any reasonable view thereof will permit."

See Hanover Bank *vs.* American Dock & Trust Co., 148 N. Y., 619.

Where a party has knowledge of such facts as would induce a man of ordinary prudence to make further inquiry, a failure to make inquiry is visited with all the consequences of notice.

Wade on Law of Notice, § 11.

The bank is, of course, chargeable with the knowledge of its cashier.

First Nat. Bank *vs.* Blaine, 60 Fed., 78.

Third Nat. Bank *vs.* Harrison, 10 Fed., 243.

Merchants' Nat. Bank *vs.* Tracy, 77 Hun, 443.

Daniel on Negotiable Instruments, § 802.

The Receiver of the bank stands in precisely the same position as the bank.

High on Receivers, § 201.

Cooper *vs.* Bowles. 23 How. Pr., 10.

Conclusion.

FOR THE REASONS STATED, it is submitted, therefore, that the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court was error, and should be reversed.

FRANK SULLIVAN SMITH,
Of Counsel for Plaintiff in Error.

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1899.

GEORGE M. ISRAEL,

Plaintiff in Error,

vs.

No. 254.

CHARLES F. CALE, as Receiver of THE ELMIRA NATIONAL BANK, (substituted for Charles Davis as Receiver, etc.),

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

DAVID WILCOX,

FRANK SULLIVAN SMITH,

Of Counsel for Plaintiff in Error.

United States Supreme Court,

OCTOBER TERM, 1898.

GEORGE M. ISRAEL,
Plaintiff in Error,

against

CHARLES F. GALE as Receiver of THE ELMIRA NATIONAL BANK, (substituted for Charles Davis as Receiver, etc.),
Defendant in Error.

No. 265.

Brief for Plaintiff in Error.

(The references are to the printed pages of the Record.)

STATEMENT.

In the month of May, 1893, the plaintiff in error was employed as stenographer and typewriter in the banking house of I. B. Newcombe & Co., in the city of New York. His employers were interested in certain corporations doing business at Elmira, N. Y., of which David C. Robinson was the president. During the absence of both members of the firm said Robinson called at the banking house and stated to the plaintiff in error that he desired some accommodation notes to be made by the clerks of the firm, for the reason that he had exceeded his line of discount and could not get any more accommodation; that he was building a power-house in

Statement.

Elmira and needed some money to accomplish that purpose, and that if the plaintiff in error and his fellow clerks would give him the notes which he requested it would enable him to accomplish that purpose. To use the words of the plaintiff in error "he also added that *we would not be put in any position of paying them at any time; that he would take care of them and gave us positive assurance on that point*, and naturally, knowing the man and thinking that he was a millionaire, * * * we had no hesitation about going on the notes. He said it would simply be a temporary matter. At the time I gave the note in suit other notes were given by Mollenhauer and Roll, who were, with me, clerks in the office of I. B. Newcombe & Co" (pp. 10, 11).

The plaintiff in error thereupon delivered to said Robinson his note for $17,000 dated May 4, 1893, payable *on demand to the order of Elmira National Bank*. The note had no indorsement (p. 10).

The plaintiff in error received no consideration for the execution of the note, either from the Elmira National Bank, the payee named in the note, or from Robinson (pp. 10, 11, 26).

Robinson was a director of the Elmira National Bank, whose capital was $200,000, and controlled its policy. He, and Bush, the cashier, were the most active of the directors. The Comptroller of the Currency reported to the president of the bank an overdraft in Robinson's account (p. 13). This overdraft at the close of business the day preceding the date of the note was $35,400.60, and had existed in varying amounts since March 13th, except on two days, when the credits appeared to be about $5,000, and on April 25th, the overdraft amounted to $137,400 (p. 20).

The note in suit was in the bank at Elmira May 4th, the day of its date, with like notes made by the two other clerks for $18,000 and $19,000 respectively. The cashier left for New York the night of May 4th, and prior to going away directed that the notes be placed to the credit of Robinson's account. This was done May 5th. The following day the cashier telephoned

from New York to the bank ordering the entries of May 5th to be erased and entries as of May 4th to be substituted therefor. This was done (p. 28).

On the morning of May 4th, there was an overdraft of $35,000 against Robinson on the books of the bank. His account *would have been overdrawn* at the close of business May 4th, *about $50,000 but for the entry of the proceeds of the notes of the plaintiff in error and his fellow clerks* (p. 28).

The personal notes of Robinson then held by the bank amounted to $19,000, besides notes upon which he was endorser amounting to $34,000 (p. 28).

The president of the bank had no knowledge of the discounting of the notes obtained by Robinson from the clerks of I. B. Newcombe & Co. (p. 15).

The cashier had never heard of any of the makers of the notes before May 4th, 1893. He did not ask Robinson "as to the responsibility of the paper" (p. 25). He asked for neither Robinson's indorsement of the notes nor for collateral security for their payment, and yet *he looked to Robinson to pay the notes if the makers did not pay them* (p. 25), and obtained from him *after* the discount of the notes, and *before* payment thereof was demanded, a written guaranty of their payment (p. 27).

When the bank went into the hands of a receiver sixteen days after the proceeds of the notes were passed to Robinson's credit, the aggregate amount of so called "Robinson paper" in the bank was about $300,000 and the amount of so called "Bush paper," or notes made by members of the cashier's family which had come to the bank through him, was about $107,000 (pp. 27, 28).

Suit was brought upon the note by the receiver of the bank in the United States Circuit Court for the Southern District of New York, and was tried before Judge Shipman and a jury, resulting in a verdict against the maker of the note by direction of the Court (p. 29).

The defendant objected to the direction of a verdict and

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The note in suit is void for want of consideration.

requested to have several questions submitted to the jury which requests were refused, and thereupon duly excepted to each of said rulings of the Court (pp. 28, 29).

The defendant obtained a writ of error to the United States Circuit Court of Appeals from the judgment entered upon said verdict, and upon the affirmance thereof by said Court, a writ of error to this Court was duly granted, and the plaintiff in error in support thereof respectfully presents the following

ARGUMENT.

I.

The note in suit is void for want of consideration.

There are but two parties to the note, the maker and the payee, between whom the consideration is open to inquiry.

Byles on Bills, 130.
Bigelow on Bills and Notes, p. 88, §2.
Daniel on Negotiable Instruments, §174.

1. *No consideration passed from the bank, the payee, to the maker of the note.*

There was no business relation whatever between the bank and the maker of the note. The cashier of the bank testified that he first heard of the maker of the note when he first saw the note in suit, at his bank the day of its date; that he had never seen the maker or his fellow clerks prior to the presenta-

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tion of their notes; that he never made any inquiry as to their responsibility from any one else than Robinson (p. 20), and that he had no recollection of asking Robinson as to their responsibility (p. 25).

2. *No consideration passed from Robinson to the maker of the note.*

This was shown by the testimony of the plaintiff in error (pp. 10–11) and of Robinson (p. 26), and the testimony is undisputed.

3. *No consideration passed from the bank, the payee named in the note, to Robinson who obtained and delivered the note to the bank.*

It is apparent from the circumstances surrounding the transaction between the bank and Robinson, that a consideration was not of sufficient importance to be thought of. The discount of $54,000 of promissory notes—more than one-fourth of the capital stock of the bank—was entered into so lightly by the cashier that the notes were taken without the knowledge of the president of the bank and without action by the loan committee (pp. 15, 19). The sole object of Bush the cashier, and of Robinson the controlling director, was to enable the cashier to report technically to the Comptroller of the Currency the closing of the overdraft in Robinson's account, which, except upon two days, had existed since March 13th, and upon April 25th, had amounted to nearly three-fourths of the bank's capital (p. 20), and which had been the subject of a warning addressed to the president of the bank by the Comptroller of the Currency (p. 13). It is evident that this technical report to the Comptroller of the Currency as to the condition of the bank, by which it must appear whether or not the overdraft was still in existence must be made as of the 4th day of May, 1893. This is true because the entries of the notes made in the books of the bank May 5th were erased by the order of the cashier telephoned from New York, and the entries

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were made as of the 4th day of May (p. 28). The morning of May 4th Robinson's *overdraft was $35,000*, and but for the entry of the notes at the close of business on that day *the overdraft would have been about $50,000 !* (p. 28).

The cashier cared nothing for the validity of the notes or the responsibility of the makers so long as they served the present purpose of enabling him to stretch his elastic conscience to a point necessary to permit him to report to the Comptroller of the Currency that the Robinson overdraft no longer existed.

The only object and the sole result of the pretended discount of the notes was to lay the false foundation for this report to the Comptroller of the Currency. No real diminution of Robinson's indebtedness to the bank was either intended or effected. This is shown by (1) Robinson's subsequent execution of a guaranty of the payment of the notes bearing the same date, (p. 27), and (2) the testimony of the cashier that although Robinson had not endorsed and had not then guaranteed the payment of the notes he looked to him to pay them (p. 25). No financial consideration can be found in the transaction. It was nothing more than a bookkeeping device concocted between the cashier and the controlling director of the bank in furtherance of a policy which enabled them to pile up in the bank $300,000 of "Robinson paper" and $107,000 of "Bush paper"—aggregating an amount more than double the capital of the bank—and to postpone for their own advantage its ultimate disastrous ruin. The transaction lacked the elements essential to consideration. It was necessary that the apparent purchase be a purchase in fact and not a mere bookkeeping entry.

> "*Mere discount and credit do not of themselves constitute a bona fide purchaser for value.* To occupy that position the holder *must actually have parted with something of value* for the note."
>
> Daniel on Negotiable Instruments, § 779c.

At the time of making the entry of the note upon its books,

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the bank parted with nothing and gave to Robinson only a valueless credit. At the moment that the note was discounted, and at all times thereafter, the bank looked to Robinson to pay the notes and he carried out the understanding that his liability should not be lessened by executing a written guarantee of their payment. There was not only an absence of agreement that the notes should be received in payment or extinguishment *pro tanto* of Robinson's indebtedness to the bank, but on the contrary it appears that after taking the notes the bank could enforce the original claim against Robinson, and that it was in precisely the same condition as it would have been had it not received the notes. Neither was there any indulgence or forbearance granted to Robinson.

This was clearly insufficient to establish a consideration between Robinson and the bank.

Randolph on Commercial Paper, § 466 ;
Byles on Bills, p. 128 ;
Edwards on Bills and Notes, § 452 ;
Parsons on Notes and Bills, p. 196 ;
Platt *vs.* Chapin, 49 Barb., 318 ;
Thompson *vs.* Sioux Falls Nat. Bank, 150 U. S., 231 ;
Hume *vs.* The Howe Machine Co., 54 Conn., 394 ;
Dresser *vs.* M. & I. R. R. Co., 93 U. S., 92 ;
Manufacturers Nat. Bank *vs.* Newell, 71 Wis., 312.
See also other cases cited on pages 31 and 32 of the principal brief for plaintiff in error.

Randolph in his work on Commercial Paper at § 466, above cited says :

" A debt already contracted and due from one person was no sufficient consideration for a note by another. Unless it be taken in satisfaction or unless credit have been given to the original debtor at the maker's request.
* * * * * * *

In general a note *payable in future* for a debt of a

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third person already due amounts, as we have seen, to indulgence as to the latter debt and has in that a sufficient consideration. But a note which is given for a debt of another simply, and without indulgence, is without consideration and will not bind the maker, *although credited on such debtor's account.*"

In Bingham *vs.* Kimball, 17 Ind., 396, a note was given by the defendant for lumber *previously* furnished to the State Board of Agriculture; it was *held* that the contract was *nudum pactum.* Citing:

> Leonard *vs.* Vredenburgh, 8 Johns., 29, 39;
> Smith on Contracts, p. 119, 4th Am. Ed.;
> Browne on Statute of Frauds, § 191;
> Birkmyr *vs.* Darnell, 1 Smiths' Leading Cases, p. 287, and note;
> Tyner *vs.* Stoops, 11 Ind., 22.

In Stoudenmire *vs.* Ware, 48 Ala., 589, it was held that a promissory note given for the debt of another, on the assurance of the payee that the agent of the debtor will pay it on request, but without the knowledge or assent of such debtor or his agent, is without consideration, notwithstanding the note is made payable some time after the transaction, and the claim against the debtor is receipted and delivered to the maker.

In the case of Crofts *vs.* Beale, 11 C. B., 172, Wm. Beale, the defendant, showed that one John Beale was indebted to the plaintiff in the sum of £1,000 and that, being pressed for payment, and a writ having issued against him at the suit of the plaintiff, he and the defendant gave the plaintiff their joint and several note, being the note declared on.

JERVIS, C. J., said in reply to the suggestion that the note might have been given in consideration of a former agreement: "We cannot assume that there was any consideration other than that stated in the plea.

In Byles on Bills, 6th Edit., p. 96, note p., it is said that, 'if a note be payable immediately it is conceived that the present pre-existing debt of a stranger would not be consideration, unless credit had been given to the original debtor at the maker's request.'"

The jury having found that there was no other consideration than above stated it was *held* that the plaintiff could not recover.

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"Although the note of a third party is made directly payable to the creditor, without signature or indorsement of the debtor, and is credited on account, it will not be a payment if it has not been received as such. Making the note payable directly to the creditor does not change its character as a conditional payment only, without an agreement to that effect."

Randolph on Commercial Paper, § 1546.

In the case of Puget de Bras *vs.* Forbes & Gregory, 1 Espinasse, 117, the defendants gave a third party purchasing bills for the plaintiff their bill of exchange against them as drawers. The money for the bill was in the hands of the third party, who failed before paying for the bill.

Lord LOUGHBOROUGH held that the plaintiff could not recover because he was subject to all the equity the defendants could have had against the party negotiating the bill, if the bill had been drawn payable to that party.

In Thomas *vs.* Thomas, 2 Q. B., 859, PATTESON, J., says:

"A consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be of some benefit to the defendant or some detriment to the plaintiff, but at all events it must move from the latter."

4. *The note of the plaintiff in error was not available for the use made of it by Robinson and the bank without the consent of the maker.*

There were two implied conditions imposed upon Robinson by the plaintiff in error when he delivered to him the note in suit. These conditions were that (1) the note was to be used in obtaining money for use in building a power-house for the corporation in which I. B. Newcombe & Co. were interested, and (2) Robinson was to "take care of the note," and the maker was not to be called upon to pay it (pp. 10, 11).

In view of these restrictions upon the use of the note which was made payable to the bank without indorsement by Robin-

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son, the bank is not entitled to the character and privilege of a *bona fide* holder of the note.

It is apparent from Robinson's testimony that he concealed from the makers of the notes the use to which they were to be put, and that notwithstanding what he assigned as his reasons for asking for the notes he obtained them for the sole purpose of aiding the cashier of the bank to conceal his overdraft (p. 26).

> Bigelow in his work on Bills and Notes (Students' Edition), pp. 221, 222, says:
>
> "To make a man such ("*bona fide* holder for value") as regards the defendant, with the *special* rights of the position, there must have intervened between the two at least one holder. And ordinarily such a holder is an indorsee; * * * where there has been no intervening holder, the plaintiff and defendant are called immediate parties, and any defense is open which would be open to an action upon an ordinary simple contract in writing; the doctrine in regard to equities has no application to such a case."
>
> RANDOLPH, in his work on Commercial Paper, says, § 466:
>
> "Where two persons give a draft for the debt of one of them to a third person, with an agreement that one of the drawers shall not be held liable, it has been held that he can avail himself of this agreement, and establish a want of consideration thereby in a suit brought against him by the payee of the draft."
>
> In the same section the author says, citing Crofts *vs.* Beale, *supra:* "A debt already contracted and due from one person, was no consideration for a note by another, unless it be taken in satisfaction or unless credit have been given to the original debtor *at the maker's request.*"
>
> See also § 1546, quoted *supra*.

That there was no such request is established by the testimony of the plaintiff in error (pp. 10, 11,) Bush, the cashier of the bank (p. 20), and Robinson (p. 26).

Point I.

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The note of the plaintiff in error could not be used for the payment *pro tanto* of Robinson's debt to the bank without the maker's consent.

Spencer *vs.* Ballou, 18 N. Y., 327;
Toby *vs.* Barber, 5 Johns., 68;
Raynor *vs.* Land, 28 Hun, 35;
Potts *vs.* Mayer, 74 N. Y., 594.

In the case of Ellis *vs.* Clark, 110 Mass., at page 392, GRAY, J., says:

"The defendant, as the jury were rightly instructed, having put his name on the note after it had been delivered to the plaintiff, and not as part of the original contract, could not be held liable without proof of some new and independent consideration. That consideration need not be a benefit to the defendant. Any loss or disadvantage to the plaintiff, by giving up some right against a third person, or agreeing to abandon or delay enforcing some right against him, would be sufficient. But the consideration or motive of the promise *must be known to the promisor. The minds of the parties must meet and agree upon the terms of the whole contract, including the promise on the one side and the consideration for it on the other.*"

See also Pratt *vs.* Hedden, 121 Mass., 116.

The payee, not being a *bona fide* holder under the law merchant, the plaintiff in error is entitled to show as a good defense that the delivery of the note was conditional, as well as that the note was without consideration.

Higgins *vs.* Ridgway, 153 N. Y., 130;
Benton *vs.* Martin, 52 *id.*, 570;
Bookstaver *vs.* Jayne, 60 *id.*, 146.

Point II.

II.

The bank acquired no title to the note which can be enforced against the maker.

The cases cited by the learned Judge who delivered the opinion of the Circuit Court of Appeals in support of the judgment of the trial Court are not analogous to the case at bar, and the contention of the plaintiff in error is not opposed to those decisions.

In Swift *vs.* Tyson, 16 Peters, 1, the bill of exchange in suit was *indorsed* to the plaintiff in *payment* of a promissory note due to him. The plaintiff was a *bona fide* holder of the paper, without notice, and for a consideration, which although it was a pre-existing debt, the Court held to be good. But in the case now before the Court the paper in suit is without indorsement between the maker and the payee, and there was no *payment* of any debt, either concurrent or pre-existing by means of the note. The relation of Robinson to the bank as its debtor was not changed, and the bank parted with nothing either to him or to the maker of the note.

In National Bank of the Republic *vs.* Brooklyn C. & N. Ry. Co., 14 Blatchf., 242, affirmed by this Court, 102 U. S., 14, the note in suit was pledged to the plaintiff as collateral security for a loan. In giving the opinion of the Court upon affirmance Mr. Justice HARLAN lays stress upon the fact that the note came to the bank so indorsed that the bank became a party to the instrument, and that the bank received it under an obligation to present it for payment and give notice of non-payment, and this was a sufficient consideration to protect it against equities existing between the other parties *of which it had no notice.* Mr. Justice HARLAN says, page 27:

"It (the bank) assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. * * *

If the bank was deceived as to the real ownership of the paper, or as to the purposes of its execution and delivery to Hutchinson & Ingersoll, it was because the railroad company intrusted it to those parties in a form which indicated that the latter were its rightful holders

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and owners, with absolute power to dispose of it for any purpose they saw proper.

Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, *if the paper be so indorsed that the holder becomes a party to the instrument*, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defenses between prior parties, of which he had no notice."

In the case of Mohawk Bank *vs.* Corey, 1 Hill, 513, the plaintiff bank took the note in suit indorsed by the defendants before maturity in *payment* of other notes of the maker, indorsed by another, which the bank gave up and discontinued a suit thereon then pending. The Court *held* this to be a sufficient parting with value to entitle the plaintiff bank to the rights of a *bona fide* holder. BRONSON, J., in giving the opinion of the Court, said, page 515: "If the note had been made for the purpose of taking up another note in the Albany City Bank, to which the indorsers were parties, it would have presented a different question."

It is difficult to discover the analogy between the case at bar and Mohawk Bank *vs.* Corey, *supra.*

The remarks of the learned Judge who delivered the opinion of the Circuit Court of Appeals upon the rules governing accommodation paper, are not applicable to an instrument that lacks the intervention of a third party upon the instrument and deprives the party attempting to enforce it of the character of a *bona fide* holder.

Cases presenting much closer analogy to the case at bar than those cited by the learned Circuit Court of Appeals will be found in Bradshaw *vs.* Miners' Bank of Joplin, 81 Fed. Rep., 902; Hagan *vs.* Bigler, 49 Pac. Rep., 1011; Dowden *vs.* Cryder, 55 N. J. L., 32; Vorce *vs.* Rosenbury 12 Neb., 448; Messmore *vs.* Meyer, 56 N. J. L., 31; Downes *vs.* Richardson, 5 Barn. & Ald., 657, and Crofts *vs.* Beale, 11 C. B., 172, in

Point III.

The maker was not bound by the use made of the note.

which there is a closer similarity of facts to the case at bar, and in which the Courts arrived at conclusions opposed to that which was reached in this case by the Circuit Court of Appeals.

III.

The maker of the note was not bound by the use made of it.

Robinson, not being a party to the note, acted either as a messenger or as an agent of either the payee or the maker of the note. If his relation to the transaction was that of a messenger between the parties, certainly nothing was done to give validity to the *nudum pactum* between the maker and the payee. If he was an agent of the bank his knowledge that the note was without consideration bound his principal. If he was the agent of the maker of the note he was bound by the terms of his agency, which in no wise included or implied the right to make the use of the note to which Robinson put it.

The facts in the case of Messmore *vs.* Meyer, 56 N. J. L., 31, are so similar to the facts in the instant case and the reasoning of the Court so appropriately applies to the case at bar, that the attention of this Court is respectfully called to the discussion thereof on pages 21 and 22 of the principal brief for plaintiff in error.

Point IV.

IV.

The trial Court erred in directing a verdict in favor of the receiver of the bank and against the maker of the note, and in refusing to submit to the jury the question of the bona fides of the bank.

Sufficient reasons have already been stated in the preceding points of this argument to establish the error of the trial Court in directing a verdict upon the note in suit.

But aside from the error involved in directing a verdict, had there been no motion for the direction of a verdict before the Court, the plaintiff in error was entitled to have the question of the good faith of the bank passed upon by the jury in a transaction in which the testimony of the cashier of the bank "shows his conduct to have been *unusual*, *imprudent* and *inconsistent* with the character which he seeks to maintain as a *bona fide* holder."

Canajoharie Nat. Bank *vs.* Diefendorf, 125 N. Y., 191, 206.

The facts shown in the Record relating to the conduct of the bank, and the attitude of Bush, the cashier, and Robinson, the principal or "controlling" director, toward the bank and toward each other were forced from unwilling witnesses, who, if they admitted too much, might be proceeded against criminally, and who would naturally endeavor to appear to have acted in good faith. Yet in reading the testimony of Bush and Robinson one finds enough to lead to the conviction that Bush as well as Robinson knew that the paper of the plaintiff in error and his fellow clerks was worthless, and that its only value to those who were trying to prevent for a little longer the fall of the structure which they had undermined, was to enable them to deceive the Comptroller of the Currency, and thus obtain temporary immunity and perhaps ultimate

Point IV and Conclusion.

safety from the result of the wrong which they had committed.

In the circumstances, it was for the jury to say whether the cashier, whose knowledge was that of the bank (Daniel on Negotiable Instruments, § 802), had not notice of all the facts attending the delivery of the notes to Robinson and their use by him.

Daniel on Negotiable Instruments, §§ 795*b*, 799.
Byles on Bills [Sharswood's Ed.], 119, 226.
See also cases cited under Point Fourth of the principal brief for plaintiff in error.

Conclusion.

The judgment should be reversed.

It appears upon the Record that the notes of the plaintiff in error and his fellow clerks are worthless, and it may be thought that neither the prosecution nor the defense of suits upon those notes is of sufficient importance to engage the attention of the Courts. But it is reasonable that the young men who made their notes without receiving any benefit therefrom relying upon the assurance of a man they believed to be a millionaire (p. 11) that "he would take care of" the notes, should attempt to prevent the rendition of judgments against them in the hope of better days. To enforce these notes in the circumstances of their creation and use, is not only opposed to the rules of commercial law, but is "repugnant to the morals of the times" in making it easy for those to whom important trusts are committed, to impose upon the public by devices that are abhorrent to honest men.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court should be reversed.

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